EUROPEAN COMMISSION

Brussels, 20.7.2010
SEC(2010) 949

SUPPORTING DOCUMENT

Accompanying the

REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

On Progress in Romania under the Co-operation and Verification Mechanism

ROMANIA: Technical Update

{COM(2010) 401 final}

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- *Design and implement a rational and realistic staffing model for the justice system on the basis of the ongoing needs assessment*
- *Develop and implement a plan to restructure the Public Ministry that addresses the existing managerial shortcomings and human resources issues*
- *Monitor the impact that the newly-adopted amendments to the Civil and Criminal Procedure Codes have on the justice system so that any necessary corrective measures can be incorporated in the planned new Codes*
- *Report and monitor on the progress made, as regards adopting the new Codes including adequate consultations and the impact it will have on the justice system*
- *Enhance the capacity of the Superior Council of Magistracy to perform its core responsibilities as well as its accountability. In particular, address the potential conflicts of interest and unethical actions by individual Council members. Recruit judicial inspectors, according to the newly-adopted objective criteria, who should also have a greater regional representation*

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- *Adopt legislation establishing an effective and independent integrity agency with responsibilities for verifying assets, potential incompatibilities and conflicts of interest, as well as issuing mandatory decisions on the basis of which dissuasive sanctions can be taken*
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Note:

Under each of the four benchmarks, several issues of particular concern were mutually agreed when the Cooperation and Verification Mechanism was created in December 2006. These issues are listed above under each benchmark and have been addressed as far as progress has been reported. You may consult previous reports at: http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

1. BENCHMARK 1: ENSURE A MORE TRANSPARENT AND EFFICIENT JUDICIAL PROCESS NOTABLY BY ENHANCING THE CAPACITY AND ACCOUNTABILITY OF THE SUPERIOR COUNCIL OF MAGISTRACY. REPORT AND MONITOR THE IMPACT OF THE NEW CIVIL AND PENAL PROCEDURES CODES

Codes

After a standstill between October 2009 and January 2010, Parliamentary discussions on the Civil and Criminal Procedure Codes advanced and the Codes were adopted by Parliament on 22 June and promulgated by the President on 30 June. Representatives of stakeholders and civil society were invited to participate in Committee sessions. The Commission's recommendation to adopt the Procedure Codes has therefore been achieved.

The entering into force of the four new codes is foreseen for late 2011. Implementing legislation for all four codes, which would determine the necessary amendments to related legislation, has not yet been finalised. A draft of the implementing law for the Criminal Code was published for public consultation on 21 June. Drafts of the implementing laws for the Criminal Code and the Civil Code were approved by the Government on 7 July and will be sent to Parliament for debate. Implementing laws for the Procedure Codes will now be prepared following the adoption of the actual Procedure Codes. Further work is therefore required to fulfil the Commission recommendation to facilitate the swift entry into force of the four codes through the adoption of an implementing law that will render the legislative framework coherent.

In May 2009, in the ambit of the inter-institutional working group set up by the Ministry of Justice for the impact assessment of the new codes, a questionnaire was sent to Courts and Prosecutors' Offices. The answers submitted by 219 courts and the General Prosecutor's Office have been compiled and analysed. The results will be fed into the overall impact assessment of the new Codes to be carried out by consultants financed as part of a World Bank loan to support judicial reform. However, selection of the consultants has been delayed due to procurement issues. Overall, progress on the Commission's recommendation in its report of July 22, 2009 - to carry out a thorough assessment of the impact of the four codes on the functioning of the judicial system and organisation of the courts and prosecutors' offices and to quantify the budgetary means needed to implement them – has been minimal.

In order to advance the implementation of some important reforms included in the procedural codes, the government has prepared a draft of the so-called "small reforms law" which should enter Parliamentary discussion soon. The initiative advances certain elements of the procedural codes which target the acceleration of the trials, such as the simplifying of the summoning procedures, restricting the right of appeal for some case categories and creating the possibility for a defendant to admit guilt in criminal trials. Other elements target the reduction of workload: the competence of the High Court of Cassation and Justice (HCCJ) to try cases in first instance would be reduced so it would be able to focus on its role as a real cassation court, while introducing the principle of opportunity would reduce the caseload of the prosecution.

Another initiative launched by the government is a consultation on a "Strategy for the development of Justice as a Public Service". The Strategy addresses many issues including the implementation of the codes and improving the legislative, institutional and financial framework of the judiciary. Whilst the proposal for such a strategy is broadly welcomed, many professionals note that the value of the strategy cannot be judged without a detailed and time-bound action plan.

Jurisprudence

One of the main instruments of unification of jurisprudence remained the appeal in the interest of the law. The previous backlog of appeals has been eliminated by the HCCJ. Following a recommendation by the Commission, a streamlined procedure, according to which the relevant section of the court prepares a report on the case before having the plenum decide on it, is generally applicable to all sections now.

The draft Small Reforms Law foresees a substantial change of the existing practice for appeals in the interest of the law. The scope of persons with legal standing to initiate the procedure will be extended to the Ombudsman and the leading boards of the HCCJ. In addition, competence to determine these appeals is transferred from the joint sections of the HCCJ (requiring at least two-thirds of all HCCJ judges to attend) to a special 25 judge panel. "Rapporteur judges" will draft a report on the case mentioning the different possible solutions of the legal matter, specialist opinions, relevant jurisprudence and doctrine. Deadlines for trying the appeal and publishing the decision and its reasoning will be introduced. These suggestions follow the Commission's recommendation to streamline the procedure for appeals in the interest of the law and ensure at the same time that expertise in all relevant areas of law is provided.

While the future changes are welcome, it should be recalled that the appeal in the interest of the law is not the exclusive method of unification and it remedies conflicting jurisprudence only once such legal practice already exists. Once the Civil Procedure Code is in force, the High Court will act increasingly as a Cassation Court judging appeals on points of law. The court will also be in charge of unifying jurisprudence in areas of law which presently are not under its jurisdiction - such as family or bankruptcy law. Consideration should therefore be given already under the current legal framework to the internal organisation and working methods of the HCCJ, in order to ensure it will be in a position to fulfil its future work. In this regard, the project developed by the HCCJ and supported by the Superior Council of Magistracy (SCM) in the ambit of a Transition Facility project[1] could serve as a good starting point to improve the working methods in order to achieve a proactive and comprehensive system to promote a stable and unified jurisprudence.

The publication of a selection of relevant court decisions by the HCCJ and other courts has continued, with various hard copy cassation collections produced as well as some decisions being published online.[2] However, significant delays have arisen in populating a national portal (Jurindex) for the publication of the full motivations of all court decisions. Recent commitments by the SCM of renewed support for the further development of this portal, including financial and logistical support, are

[1] RO/2007-IB/JH/01

[2] From January 2010, the HCCJ's quarterly cassation bulletin is being published on a monthly basis.

timely. The national portal is a key project to ensure that the full jurisprudence and motivated decisions of courts are published and accessible to all, increasing transparency in the act of justice.

Staffing

Human resourcing continues to remain a major challenge. The Commission's report of 22 July 2009, called upon the SCM to adopt a flexible priority-driven approach to human resourcing.

The Human Resources Strategy adopted in 2008 was premised on a significantly lower number of retirements than materialised. This exacerbated already existing resourcing problems. Since summer 2009 the SCM has reacted to these trends by increasing the intake of magistrates. As a result in the year to June 2009 more magistrates were recruited than left the magistracy which resulted in a small fall in the number of vacancies. However, this increased recruitment may have come at a cost. The majority of the new recruits are now entering the magistracy through the extraordinary direct entry exam for legal professionals with five years experience, as opposed to graduating from the National Institute of Magistracy (NIM). Whilst this may have been necessary to address rapidly the large numbers of exits and address widespread vacancies including at courts and prosecutors' offices with the highest workloads, these candidates do not receive the same training as the candidates who graduate from the NIM. This has raised questions as to the quality and preparedness of the direct entrants in particular as, contrary to the new magistrates coming from the NIM, they are not subjected to the same capacity exam. With a view to a medium term solution, the SCM increased the intake to NIM for 2009 but even this rise would appear insufficient to minimise use of the extraordinary direct entry competitions. More substantial reflections are required on increasing capacity at the NIM as well as training and recruitment arrangements.

To accompany other emergency measures, the Commission's recommendation advocated transferring vacant positions to where they are needed most. In short, this means to start correlating the personnel scheme with workloads in order to allow new recruits or transferred or promoted personnel to be directed towards courts and prosecutors' offices with the highest workload. Whilst the SCM has continued to redistribute the vacant positions identified in spring 2009, no additional positions have been identified and any further identification of positions for horizontal redistribution has been postponed, despite suitable vacant positions for reallocation exist. In addition, as in previous periods, vacancies have been filled in the last 12 months at courts and prosecutors' offices with low workload that could have been redistributed. As in 2009, the possibility of undertaking meaningful vertical redistribution has been quashed by the organisation of promotion contests to fill vacant positions at higher courts and prosecutors offices. The number of magistrates seconded to other institutions has reduced slightly since last summer and the vast majority of the remaining secondments are to institutions connected to the judicial system.

Looking to the medium and long term, the Commission's recommendation of 22 July called upon the Romanian authorities to progress structural reforms, such as transferring administrative tasks to auxiliary personnel, and to re-dimension the personnel scheme to allocate personnel according to workloads and therefore to

maximise efficiency of existing personnel. Since last summer the SCM has identified the attributions to be transferred and the required qualifications and competences of the auxiliary personnel who will take on this work, and prepared the necessary legislative amendments. The SCM has also proposed legislative amendments to introduce court managers. In addition, an EU-financed technical assistance project is assisting the SCM in reviewing its human resources strategy and management. In December 2009 the SCM began piloting a provisional system which imposes an optimal, maximum workload per judge.

Work was also commenced to identify courts and prosecutors offices with a small workload,[3] for possible closure and reallocation of their resources. However, from an initial 41 courts and prosecutors' offices, the working group has now narrowed its considerations to nine locations which do not operate at all and six other locations with small workloads, although final recommendations will be made on a case by case basis. The project also considers altering territorial circumscriptions with a view to ensuring viable workloads in those locations not earmarked for closure but currently with a disproportionately low workload per judge or prosecutor. Five courts and associated prosecutors' offices are foreseen to receive an increased territorial circumscription.

In accordance with a recommendation by the Commission and in the context of implementing the new codes, the geographic distribution of personnel must be reviewed as a priority. It is striking that at courts of the same tier of jurisdiction workload per judge or prosecutor can vary dramatically irrespective of vacancies.

In addition, the possibility of a certain level of specialisation of judges, both at the level of the HCCJ and at lower courts should be examined, keeping in mind the importance of preserving effective random case distribution. This would at the same time increase the speed of resolution of certain types of cases and improve the general consistency of jurisprudence. Proposals from the HCCJ in this regard have been endorsed by the SCM and transmitted to the Ministry of Justice.

Public Ministry

The General Prosecutor was reappointed for a new term of office in October 2009. Steps taken to continue the reform of the Public Ministry since July 2009 include implementation of an integrated financial management system. Measures are being taken to strengthen asset recovery. These include the preparation of a manual of best practice and introducing asset recovery as an indicator in evaluating performance of prosecution offices. Work is also underway to assess possibilities to hire specialists in local prosecutors' offices, as well as transferring administrative control of the judicial police from the Ministry of Administration and Interior to the Public Ministry. A more fundamental reform of the Public Ministry including the redistribution of positions and the closure of offices remains necessary. The General Prosecutor continued to make proposals to the Ministry of Justice and the SCM to address these deficiencies.

Superior Council of Magistracy

[3] Below 2000 files per annum.

The Commission's report of 22 July 2009 called upon the SCM to strengthen its transparency and accountability, specifically in relation to human resourcing decisions and disciplinary measures but also more generally to ensure all SCM decisions are published in a clear and accessible format.

Since last summer the SCM has rectified a gap in terms of the publication of their decisions, by ensuring all disciplinary decisions including their motivations will now be published online at the point of issue. To accompany online publication the SCM has also published a jurisprudence collection of their disciplinary decisions 2006-2009. Complete agendas for meetings are now routinely published, although accompanying documents are often not available.

Concerns continue to be raised as to the transparency and accountability of the SCM in certain fields of its competence. Particular concerns have been raised as to the thoroughness, objectivity and transparency of the interviews the SCM undertakes to select judges for promotion to the HCCJ. This was one of the specific issues raised in a petition for "Integrity and Dignity" signed by hundreds of magistrates in March this year, which arose in the light of controversial appointments to the HCCJ and in light of a major corruption investigation by the National Anti-Corruption Directorate (DNA) involving HCCJ judges. The absence of a substantive written motivation of the promotion decisions to the HCCJ taken by the SCM, contrasted to the more thorough exposition of the merits contained in the written motivations of secondments and transfer decisions, has raised questions amongst other observers. The SCM is modifying its guidance for handling these promotion contests including revising the selection criteria candidates are to be assessed against during the interview. However, magistrates' representatives have proposed more far reaching measures to ensure a more objective and transparent procedure.

Concerns have also been raised as to the apparent passive approach of the SCM in handling alleged breaches of discipline or of the deontological code, as well as towards corruption within the magistracy. Statistics show that between 1 July 2009 and 1 March 2010 the Judicial Inspection received 2727 notifications or complaints. Although the vast majority did not concern disciplinary issues, the volume of complaints created a substantial workload for the inspectorate in terms of effective filtering and follow-up. During the same period the Judicial Inspection submitted 253 cases to the discipline commissions and commenced 36 ex officio investigations. As a result, the Sections for Judges and Prosecutors of the SCM imposed 5 sanctions upon judges and 2 sanctions upon prosecutors. The sanctions included one exclusion from the magistracy, five reductions of salary and one warning. The average duration of the proceedings from point of notification of the judicial inspection to final decision by the Sections was under 5 months for prosecutors and under 6 months for judges. However, there are also disciplinary decisions pending since 2008.

Disciplinary decisions reached by the Sections of Judges and Prosecutors are appealable to the High Court, including by the Judicial Inspection.[4] For the calendar year 2009, 14 disciplinary decisions reached by the Sections of Judges and Prosecutors were appealed, of which 5 decisions were upheld, 4 were overturned and 6 were pending as of April 2010. The 4 decisions which were overturned related to

[4] The Judicial Inspection has reportedly begun to exercise this power in cases where they do not agree with decision of the Sections of Judges or Prosecutors.

cases in which exclusions from the magistracy were imposed due to gross negligence. Questions have been raised as to the adequacy of the range of disciplinary penalties that can be applied, and the consistency and proportionality of application. The SCM is considering the possibility of proposing categorisation of disciplinary offences with appropriate penalties to address consistency and proportionality. An important issue as to the preventive effect and enforceability of results of disciplinary proceedings is the possibility of the magistrate to be granted retirement which puts an end to any disciplinary investigation. To grant such retirement requests appears standard practice of the SCM.[5] The SCM has also granted retirement to suspended magistrates who are under arrest or have been indicted for criminal offences, including alleged corruption in office.

Separate to disciplinary investigations, the Judicial Inspection has continued various planned inspections. These inspections included country-wide assessments of thematic issues (such as the random allocation of cases) as well as location specific controls on managerial efficiency, each producing recommendations either for particular courts or prosecutors' offices or for general application.[6]

New guidelines for the Judicial Inspection have been produced with a view to encouraging consistent working methods by inspectors and periodic meetings to discuss practices held. This remains an important objective with continued reports of inconsistent practices and jurisprudence. Recruitment of judicial inspectors according to new rules adopted in summer 2009 has continued The procedure for recruitment has been the subject of a legal challenge by the General Prosecutor who questioned its legality and expressed concern that it is insufficiently objective and transparent which as a result compromises the independence of inspectors. There is no activity-specific, periodic evaluation of the performance of the Judicial Inspection or its inspectors. The capacity of the inspectorate to fulfil its functions, with 31 posts filled and 20 vacancies can be considered as insufficient.

2. BENCHMARK 2: ESTABLISH, AS FORESEEN, AN INTEGRITY AGENCY WITH RESPONSIBILITIES FOR VERIFYING ASSETS, INCOMPATIBILITIES AND POTENTIAL CONFLICTS OF INTEREST, AND FOR ISSUING MANDATORY DECISIONS ON THE BASIS OF WHICH DISSUASIVE SANCTIONS CAN BE TAKEN.

Legal Framework

On 14 April 2010 the Constitutional Court found substantial and significant parts of Law 144/2007, the Law on the National Integrity Agency, unconstitutional.[7] In considering an exception raised in one of the Agency's first major confiscation trials, a 3.5 million euro confiscation case concerning a former Member of Parliament, the Court found that:

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5 During 2009 20 investigations were closed on this basis, as the disciplinary investigation lost its subject.

6 A thematic control of random allocation of files undertaken in 2009 identified various irregularities of practices but reportedly did not find deliberate manipulations, though it is acknowledged that the ability to detect deliberate manipulations from the control undertaken was limited. Proposals arose to amend the court computer system and the internal regulations of the court. These proposals are still pending.

7 Chapters 1 (Articles 1-9 – General Provisions) the entire Chapter 6 (Articles 45-50 on Verification Procedures) and Articles 11(e), (f), (g), 12(2), 42 (2), (3), (4), 14(c), (d), (e) and (f) .

- the power of the National Integrity Agency (ANI) to verify assets, conflicts of interest and incompatibilities of holders of public office, and to issue administrative documents detailing their findings, breached the Constitutional separation of powers in granting ANI what the Court considered to be quasi-judicial powers and that certain activities carried out by ANI's integrity inspectors had jurisdictional nature;

- the power of ANI to ask courts to confirm and confiscate significant unjustified differences between the income and acquired assets of a public official or dignitary breached the Constitutional presumption of, and prohibition on confiscating, legally acquired property, as well as the presumption of innocence;

- the obligation to publish asset and interest declarations on the webpage of their employer and their transmission to ANI for publication on ANI's webpage was a breach of the Constitutional duty upon public authorities to respect and protect the intimate, family and private lives of persons.

The decision of the Court was not unanimous and in a dissenting opinion three of the nine Court judges expressed their disagreement with the majority decision, suggesting that neither ANI's powers of verification and finding, nor the confiscation of significant unjustified differences between income and assets breached the Constitution.[8]

In reaction to the Constitutional Court's judgment the Government submitted a draft law amending the ANI law to Parliament, which was debated and adopted on 12 May. This new law was widely criticised by practitioners and civil society. On 2 June the President therefore decided not to promulgate the new law and returned the law to Parliament for re-examination. However, on 30 June the Parliament adopted the new law once again with only minor improvements. The control of assets, a fundamental element of ANI's original competences, has been lost. ANI is now deprived of the ability it previously possessed to send cases of significant unjustified differences between income and accumulated assets to court for determination and sanctioning. In its place, ANI will only be able to refer such cases to prosecutors or tax authorities, neither of whom is legally competent to sanction unjustified discrepancies arising from the verification of assets and income. In the past, in cases where no criminal offence could be proven or assets seized could not be clearly linked to an offence for which a conviction was achieved, ANI had played an important complementary role to law enforcement in providing for the follow up of significant discrepancies between the income and accumulated assets of public officials and seeking confiscation through its procedures. The majority of ANI's confiscation cases so far derive from such co-operation. An important deterrent and sanction for corruption has therefore been lost.

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[8] The three judges' separate opinion concluded that ANI did not have quasi-judicial / jurisdictional powers, given ANI did not deliver judgments, but undertook research and investigation and notifies courts or other competent institutions in order to take steps provided by the law. As regards confiscation of unjustified assets, the separate opinion concluded that the ANI law did not reverse the presumption of licit acquisition of property (as it was for ANI to present their findings as regards the discrepancies between income and assets) nor the presumption of innocence. They also felt confiscation constitutional as the Constitution allowed the legislator to institute the forfeiture in all cases of illicitly acquired assets.

As a result, under the new law follow-up or sanctioning of discrepancies between assets and income identified, and therefore meaningful control of dignitaries' and officials' accumulation of wealth whilst in public office will no longer occur. Amendments which sought to keep alive the possibility of sanctioning such unjustified discrepancies, utilising arrangements in another law allowing for the confiscation of unjustified assets, which the Constitutional Court has found constitutional as recently as 2007, were rejected by the Romanian Senate on 30 June.[9]

The new law as adopted by Parliament also includes a host of other amendments that weaken the effectiveness of ANI's legal framework in areas unrelated to the Constitutional Court decision: establishing a short prescription period of one year for completion of ANI's verifications after a public official leaves office; limitation of the period for which the *public* asset and interest declaration will remain accessible online and limitation on the period for which a state of incompatibility can be sanctioned; reducing the content of the actual declaration forms undermining their effectiveness as a tool for transparency or investigation; and significantly reducing fines for persons or institutions who do not supply information requested by ANI.

Following the publication of the Constitutional Court decision on 5 May, ANI suspended all ongoing verification activities.

Institutional Developments and track-record

Up until the Constitutional Court decision, ANI had been continuing to consolidate its institutional base. ANI had taken steps to implement the detailed, technical recommendations supplied in the first annual independent external audit undertaken in late 2009 and was now beginning to implement the recommendations arising from the second annual independent external audit undertaken earlier this year. Significant improvements to the software systems were made increasing ANI's potential efficiency.

Consolidation was also the focus as regards staffing. The number of ANI personnel had reduced slightly since summer 2009, with 113 employees in post as of May 2010, of which 55 are integrity inspectors. However, the majority of vacant positions (74 of the 87) are not budgeted (including the position of Vice President) and the focus of ANI's management had therefore been on enhancing efficiency and results with the existing personnel: introduction of new software systems, appropriate training under externally financed projects (though opportunities for comprehensive ongoing training arrangements, underpinned by a learning needs analysis, were constrained by budgetary issues). ANI had also prepared and adopted a Code of Ethics and Professional Conduct for its personnel. The National Integrity Council's (CNI) Evaluation Commission concluded its inquiries into allegations made in February 2009 against ANI's senior management. In a report issued in February 2010 the Evaluation Commission concluded that the allegations against the ANI President were in each instance either unfounded or not confirmed. A similar finding had been reached in October 2009 against the ANI Secretary General and in February 2010 the ANI President was also exonerated in a separate report into his

[9] Law 115/1996 on declaring and control of the wealth of dignitaries, magistrates, civil servants and certain persons with management positions

relations with the media.[10] Ambiguities within the law on ANI regarding the role of the National Integrity Council (CNI) have come to surface since July 2009. As a result, the CNI has not been able to act as an interface between ANI and politics and was not able to shield the agency from political accusations and promote its development.

Consolidation in terms of the institution had also been mirrored in ANI's operational track record, in line with the recommendation contained within the Commission's report of 22 July 2009. From 301 completed investigations as of 22 May 2009, by 1 May 2010 ANI had completed 1576 investigations (since the commencement of activities by the Agency). From 68 files sent to competent institutions for sanctions to be applied or for criminal investigation, as of 1 May 2010 ANI had sent 291 files to competent institutions. One hundred and seventy five of these files have been sent to prosecutors' offices (to investigate possible criminal offences – 169 cases for false statements and 6 cases for conflicts of interest); six files to courts (to confiscate unjustified wealth); and 110 files to disciplinary committees (to apply disciplinary sanctions for incompatibilities or conflicts of interest).[11] As of 1 May investigations were underway in 3534 files.

Further to a recommendation by the Commission, ANI had also taken steps to monitor the timely follow up by judicial and disciplinary bodies to cases they submit. Case management processes within ANI were reviewed and strengthened, to ensure regular and routine follow up by ANI inspectors to files forwarded to other competent institutions. As of 1 May 2010:

- 2 findings of unjustified wealth had been confirmed by the Courts in first instance decisions and the confiscation of significant assets ordered, though both decisions were being appealed.[12] Four further confiscation cases were pending before the courts for a first instance decision

- 1 finding of an administrative conflict of interest had been irrevocably confirmed by the High Court of Cassation and Justice, and a second case was pending a final decision of the High Court. In the first case ANI had commenced legal proceedings to obtain the annulment of legal and administrative documents concluded by the official in question, as well as to seek the recovery of any prejudice

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10 In the light of the experience of the Evaluation Commission, the CNI amended the Evaluation Commission's regulations such that members of the Evaluation Commission who do not attend its working meetings without justified reasons are excluded from the Evaluation Commission. Such amendments were adopted with a view to optimising the efficiency of the functioning of the Evaluation Commission and addressing criticisms as to the duration of the inquiries. Questions remain as to whether the Evaluation Commission can transparently, promptly and thoroughly investigate allegations, ensuring wrong-doing is sanctioned and that closure is brought to unfounded allegations, or whether it creates potential for political interference.

11 Of which between August 2009 and May 2010 ANI sent 131 files to prosecutors' offices, 90 files to disciplinary committees and 2 files to courts for the confiscation of unjustified wealth.

12 In the first case the Court ordered the confiscation of 458,805EUR, 1580USD and 29,345RON. In the second case the court ordered the confiscation of 9,750EUR and 913,591RON.

- 55[13] findings of incompatibility (from 110) had become final and thirteen disciplinary solutions had been ordered as a result by disciplinary bodies[14]

- Prosecutors had issued one indictment (concerning a city mayor) arising from an ANI notification and have initiated criminal pursuit in three further cases which are ongoing. Fifteen further cases have been closed by prosecutors after the initiation of the criminal pursuit – although in ten of these cases prosecutors acknowledged the existence of the offence, but decided to apply an administrative fine – and forty-four cases were closed by prosecutors without initiating the criminal pursuit.[15] One hundred and twelve further cases are pending, the majority concerning false statements, but with five cases of alleged conflicts of interest in breach of the Criminal Code.

In terms of follow up, questions remained as to the promptitude of action by disciplinary bodies and regarding the leniency of certain disciplinary sanctions applied. Questions also remained as to the celerity of proceedings before prosecutors. Given that ANI's administrative verifications are suspended until the prosecutors' investigations are complete, delays in resolving criminal files have a consequential effect on the efficiency of administrative verifications.[16] However, all these developments towards ensuring a fully operational and effective ANI – and their track record – are now placed in question by inadequacies in the new legal framework.

3. BENCHMARK 3: BUILDING ON PROGRESS ALREADY MADE, CONTINUE TO CONDUCT PROFESSIONAL, NON-PARTISAN INVESTIGATIONS INTO ALLEGATIONS OF HIGH-LEVEL CORRUPTION

The National Anti-corruption Directorate (DNA) has maintained its stable and convincing track record of investigations into allegations of high-level corruption and a significant number of cases were sent to court. In the nine months between 1 June 2009 and 1 March 2010, DNA opened 233 investigations and has sent to trial 126 cases regarding 414 defendants. In the same period at court level 53 cases resulted in final convictions against 89 defendants, while 74 conviction decisions against 144 defendants were also reached but are subject to appeal. Sustaining the

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13 These include final determinations of incompatibility against two mayors, one vice mayor, seven county counsellors and seventeen local counsellors, as well as against the former President of the Competition Council.

14 These varied from revocations from public office (2 cases) and the termination of county/local counsellors' mandates (4 cases), to the reduction in salary (1 case) and verbal warnings (3 cases). A further 29 cases are pending with disciplinary bodies, 3 cases are on trial in the courts despite being appealed outside of the legal term and in a further 9 cases the relevant official has already vacated public office.

15 Figures supplied by ANI. Comparative figures supplied by the Public Ministry cover the period January 2008 – February 2010. Of 146 notifications received from ANI, prosecutors had issued solutions in 40 cases. In 8 cases prosecutors had imposed administrative fines, 5 further cases were closed with non indictment solutions after the start of the formal criminal investigation, and in 27 further cases prosecutors issued non-indictment solutions without commencing the formal criminal investigation. In one of the cases where an administrative fine was imposed, this was successfully challenged by ANI and the defendant is now on trial.

16 In one case, concerning a Member of Parliament, it took the case prosecutor 520 days from the point of ANI's notification to decide not to initiate the criminal pursuit for alleged false statements.

solidity of the cases prepared by DNA, during the same period only 8 cases concerning 27 defendants resulted in acquittals, one of which, concerning four defendants, was the result of the decriminalisation of the relevant offence. The cases sent to court include files concerning one former minister and current deputy, one deputy, one judge and 7 mayors. The nature and number of the cases support further the evidence of the effectiveness of the specialized anticorruption prosecution.

In line with the Commission's recommendation, the efficiency of the judiciary system in trials of high-level corruption was monitored during the last twelve months. Out of the 53 cases resulting in final convictions, 16 cases resulted in penalties of prison sentences executable in detention with an average sentence of 2 years and 9 months. All other sentences were suspended. Overall on court level, the trend appears to be the issuing of more severe and a fewer number of suspended sentences at first instance level, however, this tendency is not yet reflected at the level of final judgements, where the tendency to issue lower and/or suspended penalties based on mitigating circumstances remains. However, the overall number of decisions issued by courts shows a significant increase.[17]

The celerity of the trial phase of high-level corruption cases remains problematic. The 53 trials resulting in final conviction decisions during the period under review took an average of two and a half years and 25 hearings to reach this stage. Comparative data of the previous reporting period shows that, while the number of hearings per trial stayed approximately the same, the duration of trials has gown by one quarter.[18] In six of the cases resulting in final convictions, the indictments date back to 2006, four cases were indicted in 2005, five in 2004 and two even back in 2003. In the same cases, the investigations by DNA took on average 7 months. As of 5 May, 2010, out of the 30 cases of current and former members of Parliament and Government sent to trial since 2005 only two have reached a final decision and only five further cases have reached a first instance decision with the vast majority of cases still therefore yet to reach any decision in court.[19]

The cooperation between DNA and other relevant institutions is considered effective. Out of the 1063 files registered by the DNA, 765 result from notifications from other prosecution services including the Directorate for Organised Crime and Terrorism (DIICOT), 151 from the Anti-corruption General Directorate (DGA), and the rest divided between other authorities. A significant number of DNA files sent to court result of ex-officio investigations.

Since July 2009, the Parliament swiftly approved the opening of criminal investigations in one case of a Parliamentarian who is a former Minister. The request was approved in 4 days. However, another request concerning the same

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17 131 with final conviction decisions in 2009, compared to 97 convicted persons in 2008

18 26 hearings per trial and 2 years duration on average between 1 August 2008 and 24 April 2009

19 These include a case against a former Vice Prime Minister who was indicted in June 2006 and remains on trial without a decision having yet been reached in first instance. This trial has been suspended twice following the defence invoking exceptions of unconstitutionality. The DNA investigation in this case lasted less than one year from the point of notification to indictment. Other cases include a trial against a former Member of Parliament, indicted in July 2006 and still on trial pending a decision in first instance. The DNA investigation in this case also lasted less than one year. Further cases include the trial of a former State Secretary, indicted in September 2006, and the trial of a current Member of Parliament, indicted in July 2007. These cases are also pending decisions in first instance.

Parliamentarian is pending since 16 February and a separate search request, lodged on 10 February, concerning this Parliamentarian is also still pending Parliament's approval. One case concerning a former prime minister is now considered permanently blocked by Parliament's refusal to allow the opening of criminal investigations. Overall, the Commission's recommendation of July 2009, to apply the procedure for allowing criminal investigations of Parliamentarians who are former and current members of government in a swift and uniform manner has only partially been fulfilled.

In a significant corruption case concerning a Member of Parliament investigated by the DNA, in March 2010 the Senate promptly approved the request of the Minister of Justice (at the instigation of DNA) for the preventive arrest. A HCCJ judge also stood accused of complicity in the trafficking in influence. In addition to Parliament approving the arrest of the Parliamentarian, the SCM also approved the arrest of the Judge. The Parliamentarian, the Judge and the two businessmen were therefore placed under preventive detention and subsequently were indicted on 21 May. While the Parliamentarian remains in preventive arrest, the Judge and the two businessmen were released after four days under arrest, a decision motivated by the HCCJ as arising from low social danger.

During the period under review, exceptions of unconstitutionality continued to delay all 14 high-level cases pending at the HCCJ. At the same time, a legal amendment to remove the suspensive effect of unconstitutionality exceptions remains pending in Parliament. The Commission's recommendation in this respect is therefore still not addressed.

Though the majority of the recommendations in the report of a joint working group on the individualisation of penalties for corruption offences are being addressed, only two of those actions can be considered to be accomplished.

- Court meetings on non-unitary practice have reportedly discussed penalty individualisation and execution in corruption cases;

- The new Criminal Procedure Code provides that corruption cases are tried at Tribunal level as first instance;

Other recommendations are being addressed:

- The National Institute of the Magistracy (NIM) has scheduled 16 training actions to address the recommendation to increase the number of in-service training courses on fighting corruption;

- Proposals to allow the criminal court to resolve illegality exceptions and to limit the application of suspended sentences are included in the draft Small Reforms Law, although concerns have been raised as to whether the specific approach adopted to limiting suspended sentences in the draft law is the most appropriate.

Guidelines on penalties for corruption offences drafted by the HCCJ at the end of 2009 are still in their draft form, they have not been substantially amended based on the feedback from practitioners and are still considered not sufficiently operational by magistrates. As an interesting parallel development, a group of magistrates at the

Bucharest Court of Appeal drafted a set of alternative guidelines for a range of offences, including specific guidelines for certain corruption offences, which propose a host of detailed criteria for establishing appropriate, proportionate and individualised penalties. These guidelines are reportedly being used for training by several institutions and indicate possibilities for revising the HCCJ's guidelines.

Whilst Romania has taken some steps, further work is required to meet the recommendation of the Commission to provide an appropriate follow up to the recommendations of the working group on the individualisation of penalties for corruption.

In the last twelve months, the anti-corruption legal framework – Law 78/2000 on preventing, discovering and sanctioning corruption acts as well as the Government Emergency Ordinance 43/2002 on the National Anti-Corruption Directorate – remained intact as separate pieces of criminal legislation and the status and competences of DNA are unchanged. In addition, as all exceptions of unconstitutionality related to DNA's basic legislation have been rejected by the Constitutional Court to date, its constitutionality can be considered confirmed through constant jurisprudence. It is imperative that the efficiency of the investigation and prosecution of high-level corruption is safeguarded and the stability of the legal (specifically Law 78/2000 and G.E.O. 43/2002) and institutional anti-corruption framework maintained in the context of the implementation of the new Criminal and Criminal Procedure Codes.

4. BENCHMARK 4: TAKE FURTHER MEASURES TO PREVENT AND FIGHT AGAINST CORRUPTION, IN PARTICULAR WITHIN THE LOCAL GOVERNMENT

The Romanian authorities have taken some steps to strengthen co-ordination of the National Anti-Corruption Strategy for Vulnerable Sectors and for Local Public Administration, reacting to the recommendation in the Commission's report of 22 July 2009. The Strategy is now in its final months. The Monitoring Committee tasked with overseeing the Strategy has met more frequently; and an expert level working group has been established to support the Committee's work.[20] The working group has prepared a new methodology for reporting developments under the Action Plans. Sub-working groups in certain sectors have also reviewed their existing action plans; revised action plans concerning the Ministry of Administration and Interior (MAI), Ministry of Health and for local public administration should be adopted shortly. Revisions are predominantly minor, eliminating measures no longer considered appropriate, readjusting deadlines to reflect delays and clarifying implementing steps and responsible bodies. However, despite a few additional measures proposed, the enhanced co-ordination does not so far appear to have developed to the stage of delivering better identification of vulnerable activities or corruption risks, nor mitigating actions.

Overall, individual actions have been completed but a full assessment of progress is still missing and real impacts remain unclear. This makes it difficult to determine

[20] The Monitoring Committee has met four times since July 2009, compared to twice in the preceding twelve months. The expert level working group has met five times since its creation in August 2009.

where efforts should be focused in the future and what measures are actually working.

Some efforts have been taken to step up prevention measures in certain sectors, a first step towards responding to the Commission's recommendation of 22 July 2009. Within the MAI, the Anti-Corruption General Directorate (DGA) has developed a new methodology which provides a framework for corruption risk identification and assessment. As a first stage in applying this methodology officials in each MAI structure have been designated and are being trained. DGA has also delivered two awareness raising campaigns with EU funds which appear to have delivered positive results. In addition, DGA continued preventive trainings for MAI personnel, including targeting personnel in high-risk positions (such as the traffic police); signed a co-operation protocol with the National Agency for Regulating and Monitoring Public Procurement to provide training for MAI personnel involved in public procurement; and continued disseminating anti-corruption material to MAI personnel and prepared audio-visual material for transmission in the media.

In the wider public administration, under the auspices of another EU project, the Central Unit of Public Administration Reform (CUPAR) of the MAI has developed a guide on simplification of procedures and facilitated external expertise to identify procedures for simplification in the National Agency of Cadastre and Land Registration, the Romanian Agency for Immigration, the SAPARD Agency and in the urbanism field. Some of their recommendations have already been implemented, but others require legislation or follow up is outstanding. Work to prepare an Administrative Code is ongoing.

Various tools to promote transparency and integrity in public administration have been developed, piloted and are now being promoted. Whether these tools are used by public institutions and their impact can however not be assessed. Work to strengthen the legislative and institutional framework governing ethics counsellors is ongoing. The National Agency of Civil Servants (NACS) has also continued its efforts to monitor the implementation of ethical standards and disciplinary procedures in public institutions. The information it was able to collect for 2009, indicates similar results to 2008 in terms of disciplinary cases resolved, sanctions imposed and referrals to criminal investigation authorities.[21] It is estimated that breaches of conduct are higher than those actually recorded. Few complaints (11%) are received by disciplinary bodies from members of the public. Work is progressing to establish a single, corruption reporting telephone hotline but it is not yet operational. Within institutions potentially more use could also be made of whistle blowing but few steps appear to have been taken to strengthen practical implementation and awareness of whistle blowing policies.[22]

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21 According to data obtained by NACS during 2009 disciplinary bodies solved 1072 complaints, imposing 571sanctions. The majority of sanctions were written warnings, but there were 51 dismissals. However, reportedly 80% of sanctions were cancelled by the courts. Disciplinary bodies made notifications to criminal investigation bodies concerning 50 civil servants on suspicions ranging from fraud to receiving undue benefits and abuse of office.

22 Transparency International Romania's National Corruption Report 2009 concluded implementation of the legal provisions regarding the protection of whistleblowers is "greatly deficient", with poor harmonisation of internal regulations and inadequate information to personnel.

Aside from the MAI, information on and preventive measures in other risk areas is more limited but some measures are being taken. The Ministry of Education in particular, having identified a systemic weakness arising from specific corruption cases, is procuring an information system which should assist with reducing corruption in the diploma system. However, overall across public institutions prevention measures still need to be intensified.. One recent civil society report identified major deficiencies in public administration, vulnerabilities to corruption in the education system and the need for public policies to prevent corruption in the health system.[23] Another recent survey on corruption in the health system found that 91% of respondents consider corruption within the health system as a critical issue which directly impacts on patients. Two thirds of respondents said that they have offered money to medical personnel, with 81% saying that they believe such payments played an extremely influential role in how they were treated.[24]

To assist with stepping up efforts to prevent corruption, the MAI has secured financing for the National Integrity Centre which has begun to consolidate and intensify its contribution to the anti-corruption efforts. Its network of county anti-corruption action groups offer the possibility for practitioners at the local level to identify risks and possible mitigating actions, which in turn the Centre can scrutinise and develop into policy proposals for consideration by competent institutions. A number of proposals have already been identified and are under consideration by the Centre. These include measures to reduce corruption in the traffic police, public procurement, health and fiscal sectors. Six proposals have been endorsed by competent institutions and will now be implemented. Other civil society organisations could also be useful partners for institutions at central and local level in identifying, taking forward and monitoring the impact of prevention initiatives.[25]

Steps by the General Prosecutor to strengthen the approach of county prosecution offices to combating petty and medium-level corruption seem to be beginning to deliver results. In response to the Commission's recommendation, implementation of the county prosecution strategies has continued. Indications are that the number of investigations has increased, including investigations commenced ex-officio indicating a more pro-active approach of the prosecution, and that these investigations are predominantly focused on the priority sectors identified by the strategies. In parallel to an increased number of investigations, more indictments are resulting.[26] Furthermore, more of these indictments concern bribe taking and

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23 Transparency International Romania's National Corruption Report 2009

24 Association for Implementing Democracy study undertaken by IMAS in April 2010.

25 For example NACS has recently commenced a project with a non-governmental organisation seeking to create partnerships between local authorities and civil society in identifying anti-corruption measures and monitoring implementation of anti-corruption policies.

26 In the second half of 2009 Prosecutors' Offices attached to Tribunals and Courts of Appeal issued indictments in 101 cases compared to 56 in the first half of 2009. Twenty two of the indictments in the second half of 2009 followed investigations commenced ex officio, compared to 13 in the first half of 2009 (or 5 in the first eight months of 2008). Approximately half of all investigations opened are commenced ex officio and there was a 45% increase in the number of investigations commenced ex officio in the second half of 2009 compared to the first half of 2009. In the first three months of 2010 Prosecutors' Offices attached to Tribunals and Courts of Appeal indicted 67 people. This contrasts to 44 persons during the first three months of 2009. Data on the number of cases indicted so far in 2010 is not yet available, as well as further data on the nature of cases. When this is available it will be possible to assess whether the trends observed in 2009 have continued

corruption-related offences, suggesting a greater emphasis on fighting corruption among public officials as well as a focus on more complex investigations.[27] It is too soon, however, to see whether these trends continue and for these trends to translate into final court decisions.[28]

To date, over 90% of corruption indictments by Prosecutors' Offices attached to Tribunals and Courts of Appeal result from information supplied by or worked with the judicial police of DGA. Recent results by DGA indicate an intensification of their work. The high proportion of indictments which involve their participation indicates the effectiveness of co-operation between DGA and prosecutors, and appears to reflect DGA's specialisation in terms of personnel and logistics and exclusive focus on corruption. In certain instances prosecutors have also delegated DGA judicial police officers to work on corruption investigations outside of DGA's institutional competence. This flexible approach has reportedly been confirmed by the courts when challenged. The General Prosecutor and DGA have jointly taken steps to build upon the existing co-operation, holding a series of regional meetings involving prosecutors and DGA police officers to discuss their co-operation, how it can be enhanced and to exchange best practices through presentations of recent cases. This should assist with unifying practices. A protocol is envisaged, which will clarify arrangements for co-operation, including notification procedures and information exchange, joint assessment indicators and joint training. A best practices guide on deployment of undercover investigators is also foreseen.

However, these results also indicate the need to strengthen co-operation between the Fraud Investigation Service of the Romanian Police and prosecutors in corruption cases. Statistical data indicates the Fraud Investigation Service supplies the prosecution with significant volumes of information on suspected corruption offences, but it would appear not to be leading to indictments.[29] Work to strengthen co-operation could therefore focus on identifying how this co-operation can lead to more tangible outcomes, possibly by focusing on the quality of information supplied by the police, feedback from prosecutors to focus information gathering, common performance indicators focused on indictments and convictions, or on specialisation and resourcing of investigative capacity. Prosecutors would like to see the Fraud Investigation Service designate specialised police officers to work exclusively on corruption cases.

Public procurement in Romania shows a number of weaknesses in practice and institutional structure which lead to serious shortcomings in the protection against

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27 In the first three months of 2010, 21indictments concerned bribe taking (compared to 6 during the first three months of 2009). Twenty-two indictments concerned corruption related offences prescribed by Law 78/2000 (compared to 17 during the first three months of 2009). In the second half of 2009 indictments were issued in nine complex cases compared to three complex cases in the first half of 2009.

28 Although twelve final court decisions – all convictions – were reported during 2009 concerning petty and medium level corruption cases prosecuted by the Prosecutors' Offices attached to Tribunals and Courts of Appeal.

29 Between 1 August 2009 and 1 May 2010 the Romanian Police passed to prosecution offices information on 4269 suspected corruption offences involving 3244 persons. Of these reports 748 concerned bribe taking, 1349 bribe giving, 431 traffic in influence, and 1639 other corruption related offences. These files concern acts of corruption in public administration, health, transportation, agriculture and forestry, education and labour and social protection.

conflict of interest, fraud, corruption and other serious irregularities. In the context of the implementation of EU funds, services of the Commission have pointed to those weaknesses on several occasions and transmitted a number of concrete suggestions for corrective action. The Commission has mapped the main current shortcomings in Romania as follows:

The protection against conflict of interest in the law is not sufficiently effective. Several laws address different aspects of conflicts of interest and are not sufficiently harmonised. This leads to confusion regarding the attribution of responsibilities among competent authorities. The procurement law contains rules to avoid conflict of interest situations,[30] but until recently this was limited to persons taking direct part in the process of verification and evaluation of the tenders, while in practice, indirect influence is also a significant risk. Amendments to the public procurement legislation have improved the legal protection against conflicts of interest in June 2010[31]. It is important that the most frequent cases of conflict of interest which are related to business interests of local politicians and their family are addressed in an effective way in the implementation of the law. The Administrative Transparency Law[32] could in principle apply to cases not covered by the scope of the Public Procurement Law. However public procurement authorities, such as the competent authority for complaints, the National Council for Solving Complaints (CNSC), can only operate on the basis of the legal framework for public procurement. Apart from remedy measures applicable during the procurement procedure such as fines or a re-evaluation of offers, sanctions can be either based on the Criminal Code, or on the Transparency Law, which provides for administrative sanctions such as interdiction of the right to fulfil public duties. However, in practice the application of these laws shows several shortcomings due to varying definitions of conflict of interest depending on the status of the person concerned. The Transparency Law introduces for instance stricter rules regarding conflict of interest for ordinary civil servants than for high public officials such as ministers or mayors.

Competent authorities demonstrate only limited activity aimed at preventing and detecting conflict of interest.[33] The Commission could only establish very few cases where conflicts of interest were detected by administrative authorities and sanctions were taken.

Cooperation among administrative authorities in order to design effective prevention strategies and control procedures is missing. Furthermore, as few cases are detected, few signals are transmitted to the judicial authorities.

In addition to these specific shortcomings, a number of more general weaknesses have been noted: Legislation in the area of public procurement has been subject to frequent amendments and too little assistance is provided to contracting authorities

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30 Chapter II Section 8 of GEO 34/2006

31 Government Emergency Ordnance 76/2010 adopted on 30 June 2010.

32 Law 161/2003 regarding some measures for ensuring transparency in the fulfilment of public duties and in the business sector, and for preventing and sanctioning corruption

33 In 2009, the National Authority for Regulating and Monitoring Public Procurement (ANRMAP), identified 6 violations of public procurement linked to conflict of interest through complaints or through ex-officio investigations. In 2010, ANRMAP had no such cases. It received some signals concerning conflict of interests (links between decision making persons and winners of bids) but these signals were not falling under Ordinance 34/2006. CNSC had only 5 cases out of the 9700 solved in 2009.

for the correct application of the existing legal framework. Too often, these legal amendments aim to address in a symptomatic way weaknesses of the public procurement process without engaging a comprehensive strategic analysis of underlying causes. Together with insufficient expertise and capacity of local contracting authorities, the result is often insecurity how laws and procedures should be applied. This insecurity results in turn in a high number of complaints and works against an effective prevention of irregularities.

This picture of insufficient and complex legislation on conflict of interest together with a low sensitivity towards risks among administrative authorities and a weak track record in prevention and control contrasts sharply with the important risk of conflict of interest in public procurement which is confirmed by competent authorities and may also be ascertained through data provided by other sources. The majority of conflict of interest cases transmitted by the National Integrity Agency to the judicial authorities for decision relate to public procurement. A number of high-level cases of corruption also relate to public procurement.